

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**In the Matter of:**

**HALEY S.**

**Claimant,**

**vs.**

**FRANK D. LANTERMAN REGIONAL  
CENTER,**

**Service Agency.**

**OAH No. L 2008110121**

**DECISION**

This matter came on regularly for hearing on March 30, 2009, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Haley S.<sup>1</sup> (Claimant) was represented by her parents and authorized representatives, Joel and Victoria S.

Frank D. Lanterman Regional Center (Service Agency) was represented by its Appeal and Complaint Coordinator, Marc Baca.

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

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<sup>1</sup> The surnames of Claimant, her parents, and her sister, who is the claimant in the consolidated case, are omitted from this Decision in order to protect Claimants' privacy.

## ISSUES

1. Is the service at issue in this matter an after-school program or behavioral respite?
2. Should the Service Agency be permitted to reduce the number of hours funded for that service from 30 hours per week per child to 8 hours per week per child, based on the sibling rate (i.e., one worker providing services for two children)?

## FACTUAL FINDINGS

1. This matter was consolidated for hearing with *In the Matter of Jenna S.* (OAH Case No. L2008110112).
2. Claimant is a seven-year-old female consumer of the Service Agency by virtue of diagnoses of autism and cerebral palsy. She resides with her parents, her twin sister (Jenna S.) and her two brothers, one of whom has been diagnosed with Asperger's Disorder. That sibling has been denied regional center services.
3. On May 12, 2008, an Individual Program Plan (IPP) meeting was held. At that time, Claimant and her sister were attending kindergarten three hours each day. Based on the IPP meeting, Claimant's parents and the Service Agency agreed that the Service Agency would fund for a structured after-school program with Behavioral Respite in Action for six hours per day, five days per week; 16 hours per month of respite services with Tender Touch Homecare agency; six hours per week of floor time therapy with Holding Hands agency; and two hours per week of group socialization with Holding Hands agency. The Service Agency also funded 14 hours per month of parent training services with California Psychcare. (Exhibit 5.)
4. Since the time of the IPP, Claimant and her sister have entered a day program that runs for six hours per day, five days per week.
5. The Service Agency takes the position that the additional services referenced above have taken the place of the after-school program because, in part, the additional services are accessed after school, and the services by Behavioral Respite in Action are now provided in the late afternoon and evening. Therefore, a reduction in the services by Behavioral Respite in Action is warranted. Claimant's parents assert that Behavioral Respite in Action never provided an "after-school" program in its general sense. Rather, it provided skilled behavioral respite designed to develop skills and strategies to improve severe behaviors manifested by Claimant and her sister. Claimant's parents further argue that the services are different from the other types of services being funded by the Service Agency, the two girls are benefiting from the behavioral respite, and the hours are greatly needed.

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6. Although initially designated as an after-school program, Service Agency personnel understood and acknowledged that Behavioral Respite in Action was providing behavioral respite to Claimant. That understanding and acknowledgement is evidenced by the Service Agency ID notes, which are rife with no fewer than 12 references to “behavior respite” as compared to approximately one reference to an after-school program. (Exhibit 12.)

7. The Service Agency’s understanding and acknowledgement that behavior respite services were being funded was further evidenced when the decision was made to reduce the hours of that service. In their October 8, 2008 letter to Claimant’s parents, Claimant’s Service Coordinator, Cynthia Guerra, and the Regional Manager for the Foothill School Age Unit, Candice La Mere, wrote to Claimant’s parents:

Re Haley S. . . . 30-day notice of Reduction of **Behavior Respite services**

[¶] . . . [¶]

The Lanterman Regional Center regrets to inform you that the number of hours of **Behavior Respite service** through Behavior Respite in Action agency provided by the Regional Center will be reduced from 30 hours a week to 8 hours a week effective 30 days from your receipt of this letter.

You were advised that the amount of your current **behavior respite in lieu of after school programming** would be re-evaluated after your child’s school hours increased to a full day status (6 hours). The **behavior respite** hours were initiated last year to provide continuous structure and supervision **during the after school hours** when Haley was attending a half day educational program. It is our understanding that Haley is now attending a full 6 hours a day from 8:30 to 2:30 in an educational program. In addition to the educational hours, the Regional Center is funding Floor time services 6 hours a week (clinic based), Social skills group therapy 2 hours a week (clinic based), and in-home Behavior Modification therapy 3 hours a week and 16 hours a month of regular agency respite. It is our understanding that she is also attending privately funded swimming lessons one time a week.

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The **Behavior Respite** services were originally put in place to provide a structured program in-home during the after school hours from 12:30 to 6:00 pm. You recently submitted Haley's new schedule for the 2008-2009 school year and it was determined that her schedule has changed substantially and that most of the after school hours are spent in her educational programming and various therapies. Therefore, a reduction of the **Behavior Respite** hours has been recommended. The Regional Center has been informed by your family that the **behavior respite provider** has been working in the late evening hours beyond the agreed upon hours. Regional Center views afterschool care as up to 6:00 pm and time after 6:00 pm is considered family time and a time for normal parent responsibility for providing care and supervision for a child Haley's age. Due to these factors the **behavior respite** will be reduced to 8 hours a week.

[¶] . . . [¶]

If you disagree with this decision you have the right to appeal by submitting a request for a fair hearing within thirty (30) days. Since **you are currently receiving behavior respite at the amount of 30 hours per week**, if you wish the service to continue until the end of the appeal process you must submit your request within ten (10) days of receipt of this letter. . . .  
(Exhibit 1.) (Emphasis added.)

8. On February 24, 2009, California Psychcare issued a behavioral progress report for Claimant. That report contained a section entitled, "Family Constellation" which included the name of a "Babysitter/Respite" worker. (Exhibit 7.) At the fair hearing, the Service Agency acknowledged that it does not fund for babysitting. Therefore, the individual named in the "family constellation" was a respite worker. (Testimony of Cynthia Guerra.) That individual is a trained behavioral respite worker employed by Behavioral Respite in Action. (Testimony of Joel S.)

9. Behavioral respite differs from general respite in that it is designed to address a consumer's more severe behaviors. Behavioral respite requires more intense work on the part of the respite worker than does general respite. Therefore, a behavioral respite agency employs individuals who work at a higher level than regular respite workers. (Testimony of Cynthia Guerra and Candice LaMere.) The Service Agency hires both general respite agencies and behavioral respite agencies, depending on the need of the client. In this case, the Service Agency hired Behavioral Respite in Action, a behavioral respite agency.

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10. Claimant and her sister exhibit severe behaviors, and they require constant supervision at home, at school, and on out-of-home outings. At school, each girl has a one-to-one aide, and the twins are placed in separate classes and classrooms. Claimant cannot be left alone outside, she occasionally places scissors into her mouth and nose, and she cuts with scissors when she is too close to her peers. At home, constant supervision is an extraordinarily difficult task because the twins' mother works four days per week, requiring their father to look after four children, three of whom suffer from pervasive developmental disabilities. Claimant has no concern for her own safety. In fact, she just recently ran into a four-lane street while chasing a balloon. She and her sister empty the refrigerator, so far narrowly avoiding injury from dropped glass containers. They misuse the bathroom, and squeeze out entire bottles of ketchup and toothpaste. In addition to constantly supervising his children, Claimant's father must accomplish other tasks in and around the home such as working in the kitchen preparing his children's meals (the children require special diets), paying bills, and going to the mailbox. Claimant's father explained that, when he attempts to accomplish such tasks, "that's when things happen." (Exhibit 7; Exhibit B; Testimony of Joel S.)

11. Because of their severe behaviors, both individually and collectively, taking the children out of the home for events such as movies requires the supervision of two, and sometimes three, adults. Without the assistance of behavioral respite, Claimant's parents believe they cannot integrate Claimant and her sister into the community. (Testimony of Joel S.)

12. The Service Agency contends that Claimant's parents should apply for In-Home Support Services (IHSS) because IHSS would provide the kind of evening support Claimant's parents require. (Testimony of Candace LaMere.) Further, the Service Agency contends that using the services of Behavioral Respite in Action supplants a generic resource such as IHSS, thereby violating Welfare and Institutions Code section 4648, subdivision (a)(8)<sup>2</sup>. (Exhibit 1.) Although he believes that his daughters require behavioral respite, Claimant's father does not object to applying for IHSS for additional services. (Testimony of Joel S.) However, Claimant's mother is philosophically opposed to obtaining services through IHSS and Medi-Cal. (Testimony of Victoria S.) Regardless of the unreasonableness of her position, IHSS does not provide the kinds of benefits offered by behavioral respite and, therefore, no generic resource is supplanted by the behavioral respite presently supplied by Behavioral Respite in Action.

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<sup>2</sup> According to the Service Agency's annual review, dated May 12, 2008 (Exhibit 106), Claimant did not qualify for SSI benefits.

13. Claimant's parents have always believed the service offered by Behavioral Respite in Action has been behavioral respite. The behavioral respite workers are specially trained and work with their supervisor in creating goals for Claimant and her sister. The behavioral respite workers carry notebooks to monitor the girls' progress, and the Behavioral Respite in Action case manager visits the home periodically to ensure that the goals are being met and to set new goals as necessary. The family has also been permitted to make-up unused hours on weekends. (Testimony of Victoria S. and Joel S.) Service Agency personnel believe the services are being misused because Behavior Respite in Action renders its service after 5:00 or 6:00 p.m., which is beyond after-school time and into time during which services should be provided by the parents. (Exhibit 1; Testimony of Candace LaMere.) However, other than the unsupported opinion that, except for IHSS, only the parents should render evening services, the Service Agency offered into evidence neither law nor any reason why services by Behavior Respite in Action cannot or should not be rendered at a later time, especially since Claimant's after-school hours are taken up with the various other therapies she requires.

## **LEGAL CONCLUSIONS**

1. The service at issue in this matter is behavioral respite.
2. The Service Agency shall be permitted to reduce the number of hours funded for the service, but to an extent less than that determined by the Service Agency.
3. The Service Agency is required to secure services and supports that meet the individual needs and preferences of consumers (Welf. & Inst. Code, §§ 4501 and 4646, subd. (a)<sup>3</sup>), support their integration into mainstream life of the community (§§ 4501 and 4646, subd. (a)), "foster the developmental potential of the person" (§ 4502, subd. (a)), and "maximize opportunities and choices for living, working, learning and recreating in the community" (§ 4640.7, subd. (a)). The Service Agency "shall give highest preference to those services and supports . . . that allow all consumers to interact with persons without disabilities in positive, meaningful ways." (§ 4648, subd. (a)(1)). The Service Agency is required to pursue all possible sources of funding for its consumers (§ 4659, subd. (a)(1)), but it is not required to fund supports and services where such supports and services are available from generic sources and Service Agency funds would "supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." (§4648, subd. (a)(8).)

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<sup>3</sup> All statutory references are to the Welfare and Institutions Code unless otherwise specified.

4. The first issue in this case is governed by the doctrine of equitable estoppel. In *Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 348, the court stated:

Equitable estoppel arises from the declarations or conduct of the party estopped and has five elements: “(a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the latter act upon it; and (e) the party must have been induced to act upon it.” (Citations.)

5. In this case, based on its numerous representations, the Service Agency is charged with knowledge that the service being provided to Claimant by Behavioral Respite in Action was behavioral respite. The elements of equitable estoppel are therefore met. Whether or not it intended to do so, the Service Agency continually represented to Claimant’s parents, in its own ID notes and other official documents, and by payment for behavioral respite services, that the service provided was behavioral respite. This was done with either actual or virtual (constructive) knowledge of the true facts. Claimant’s parents, being ignorant of the Service Agency’s intent to fund solely for after-school services, and not for behavioral respite, were induced to act upon the Service Agency’s representations, and did so.

6. It is insufficient for the Service Agency to have called the services behavioral respite while meaning something else. Service Agency personnel knew the difference between behavioral respite, general respite, and an after-school program. Whether or not they meant to do so, by consistently referring to the service as behavioral respite, they misled Claimant’s parents into believing that is what the Service Agency intended to fund.

7. The Service Agency argues that making the services Claimant is receiving behavioral respite would improperly change the IPP. That argument was not persuasive. The IPP was changed by the Service Agency when it acknowledged that behavioral respite was being funded “in lieu of after school programming.” (See Factual Finding 7.) Further, the Service Agency concedes that the IPP may be reviewed and modified as needed. (Welf. & Inst. Code, § 4646.5, subd. (b).) A consumer is entitled to a fair hearing, and the fair hearing process occurs, when the consumer and the Service Agency cannot agree on whether the IPP should be modified and/or the nature and extent of the modification.

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8. The Service Agency was unquestionably well-intentioned in funding for an after-school program, but erred in consistently referring to it as behavioral respite, by hiring an agency that specializes in behavioral respite to provide the service, and in failing to ascertain that behavioral respite services have been provided to Claimant since the services' inception.

9. However, regardless of what it is called or has been called before, the behavioral respite services are needed. This is not so much a matter of whether the Service Agency ever intended the after-school program to involve behavioral respite as it is a matter of present need. The need exists. The family consists of the parents and four children, three of whom suffer from pervasive developmental disorders. Most of the time, only one parent is able to supervise the children. Given his responsibilities to each of the children, Claimant's father cannot maintain 100 percent vigilance with each child. This is especially true with respect to Claimant and her sister, both of whom exhibit severe behaviors. When the dispute is, as it is here, a matter of the nature of the services already being provided and the name under which the services are being provided, the issue becomes one of semantics and nomenclature. That should not be the case. The real issue is the need of the consumer.

10. The Service Agency argues that its funding of behavioral respite supplants the budget of a generic source, specifically IHSS, and that Claimant should not receive the benefit of behavioral respite when her parents refuse to apply for IHSS services. IHSS, albeit potentially very helpful to the family, is not applicable for purposes of the issues presented at the fair hearing because it does not provide the kind of intense behavioral services behavioral respite does. Undoubtedly, IHSS could aid a family with four children, three of whom suffer from pervasive developmental disorders but, at least in this case, the philosophical opposition of Claimant's mother to IHSS services does not preclude Claimant from obtaining behavioral respite funding from the Service Agency.

11. The nature of the service being provided having been established, the issue of the proper number of hours to be funded is now addressed.

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12. When the Service Agency agreed to fund 30 hours of after school/behavioral respite, Claimant was attending school three hours per day. Thus, the need then was greater than it is now that she is attending school six hours per day. The number of hours of behavioral respite must be reduced to reflect that disparate need. At the fair hearing, the Service Agency did not establish how it came to view a monthly reduction of 22 hours, from 30 to 8, as the appropriate number. The number of hours to be funded should be determined by the need for the services. Given the additional time Claimant is now spending in school with her one-to-one aide; given the severe behaviors of Claimant and her sister; given the presence of two other children in the home, one of whom suffers from Asperger's Disorder and both of whom also require their parents' assistance and attention; given the burden placed on Claimant's father to appropriately care for his challenging children; given the other domestic responsibilities of Claimant's father; and given the limited ability of Claimant's mother to assist because of the temporal demands of her job, a reduction of behavioral respite hours by one-third is deemed appropriate. The number of behavioral respite hours shall be reduced to 20, at the sibling rate. (i.e., Claimant and her sister will each simultaneously receive 20 hours of behavioral therapy per month by the same behavioral respite worker.)

13. During the fair hearing, Claimant's father stated his daughters' behaviors and needs differed and therefore requested that the Administrative Law Judge issue a separate decision for each child. That request was granted. Claimant's parents established that each of their twin daughters is unique and that, while they share certain extreme behaviors, each exhibits extreme behaviors of her own. However, Claimant's parents did not demonstrate how disparate amounts or degrees of behavioral respite would apply to each of their daughters. Therefore, the amount of behavioral respite to be funded by the Service Agency shall be uniform between the two claimants.

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## **ORDER**

**WHEREFORE, THE FOLLOWING ORDER is hereby made:**

The Service Agency shall forthwith fund for 20 hours of behavioral respite per month at the sibling rate.

## **NOTICE**

**This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.**

DATED: April 8, 2009

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H. STUART WAXMAN  
Administrative Law Judge  
Office of Administrative Hearings